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Legal LOOP

Judges weigh in on researching jurors online

Now that social media is simply part of our day-to-day lives, it's no surprise that it's also appearing in legal cases. Lawyers routinely seek to access social media data during the discovery phase of trial, mine social media for evidence to use during trial, and research jurors prior to voir dire.

In the past I've covered the various ethics opinions regarding lawyers mining social media for evidence and researching jurors using social media. New York, D.C., Pennsylvania, Oregon, and quite a few other jurisdictions have addressed these issues. But it's not just ethics committees that are weighing in on social media use in litigation. Many Judges are throwing their hats in the ring as well and are establishing procedures for their courtrooms that address the use of social media evidence at trial.

Oftentimes judges recognize that online research alone isn't necessarily problematic. For example, in 2014 it was reported in a Tampa Bay Times article that in a ruling issued by Circuit Judge Anthony Rondolino, he indicated that allowing parties to research jurors online and then share any relevant information obtained with the court could help to avoid mistrials. His rationale was based on the premise that jurors don't always disclose relevant information during voir dire, although the failure to do so isn't necessarily intentional and can sometimes arise from a failure to understand the questions being posed to them.

Other judges are more wary of online research when it comes to jurors, such



By **NICOLE BLACK**
Daily Record
Columnist

as U.S. District Judge Rodney Gilstrap of the Eastern District of Texas. Earlier this year he issued a standing order (www.txed.uscourts.gov/sites/default/files/judgeFiles/Standing%20Order%20--%20Juror%20Research%20%28signed%29.pdf) that prohibits "all attorneys, parties, and their respective employees and agents, including jury consultants from contacting jurors through social media."

However, simply researching jurors by viewing public profiles was permitted, even where jurors might receive passive notifications of the viewing of their profile: "(T)hey are not prohibited from conducting or causing another to conduct any type of online investigation merely because a juror or potential juror may become aware that his or her ESM is being reviewed. For example, lawyers are not prohibited from reviewing the LinkedIn accounts of jurors or potential jurors even if network settings would alert that juror or potential juror to the fact that a lawyer from the case has reviewed his or her LinkedIn account."

And last, but not least, the U.S. District Court for the Northern District of New York adopted a local rule in early 2016 (www.nynd.uscourts.gov/sites/nynd/files/2016_Local_Rules_Final.pdf) that allows lawyers and their agents

to research jurors using social media so long as the information viewed is publicly accessible. However, the rule provides that passive notifications indicating that a specific person has viewed a juror's social media profile are not permitted. Importantly, the rule provides that: "If an attorney becomes aware of a juror's posting on the internet about the case in which she or he is serving, the attorney shall report the issue to the court."

So, the times they are indeed a' changin', my friends. Social media is here to stay and in many cases, that's not a bad thing. It can be a valuable tool for litigation purposes, as long as you are aware of the applicable ethical guidelines and rules of court. So use social media to your clients' advantage, but make sure to use it wisely.

Nicole Black is a director at MyCase.com, a cloud-based law practice management platform. She is also of counsel to Fiandach & Fiandach in Rochester and is a GigaOM Pro analyst. She is the author of the ABA book "Cloud Computing for Lawyers," coauthors the ABA book "Social Media for Lawyers: the Next Frontier," and co-authors "Criminal Law in New York," a West-Thomson treatise. She speaks regularly at conferences regarding the intersection of law and technology. She publishes three legal blogs and can be reached at niki@mycase.com.